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Abstract: The present paper attempted to present, through the jurisprudence used both by the Court of Justice of the European Union and by the General Court, a panorama of steps which in a careful and precise manner attempted to offer the evolution of private individuals' appeals to European justice. Does this mean an increase in appeals? Have we new limits to access to justice? Is this a more attentive and eclectic jurisdictional protection? What are the enforcement measures? These are some of the topics for discussion, evaluation and development offered based on Art. 263, letter. 4 TFEU after the Treaty of Lisbon.

Keywords: Art. 263; letter 4 TFEU; access to justice; procedural protection; Treaty of Lisbon; European Union law; CJEU; GC; enforcement measures.

Introduction

The treaty of Lisbon, among the various changes it made, also focused on Art. 263, letter. 4 TFEU relating to the limitation of the legitimacy to act of private individuals, i.e. of the so-called non-privileged appellants, trying to move the main obstacles that concerned the access of private subjects to judicial protection mechanisms (Liakopoulos, 2018; Liakopoulos, 2019). One of the most significant changes concerned the conditions for admissibility of appeals presented by private entities. In speciem, Art. 263, letter. 4, TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) listed the acts that are susceptible to challenge by natural and legal and non-legal persons and does not refer more to the relevant "decisions" adopted in the form of a regulation and/or a decision that has been taken regarding other people, but rather used a more generic expression of "acts" (Mann, 2013; Thies, 2013; Backes, Eliantonio, 2019; Eckes, 2019; Wessel, Larik, 2020; Markakis, 2020)[1]. This type of act

1CJEU, joined cases: 19-22/62, Fédération nationale de la boucherie en gros et du commerce en gros des viandes et autres contre Conseil de la Communauté économique européenne of 14 December 1962, ECLI:EU:C:1962:48, I-00943, where the judges ruled that "the comparison between Article 173 of the EEC Treaty and Article 33 of the ECSC Treaty would clearly show the intention of the authors of the EEC Treaty to reserve to the Member States, the Council and the Commission the right to appeal general acts (...)". Subsequently, the legitimacy to act limited to subjects affected by deeds that also contained "measures intended for persons determined in order to individualize them" was recognized, despite having, on the whole, the nature of regulation. In this sense, see CJEU case 39/67, Industria Molitoria Imolese and Others v. Council of the European Communities of 13 March 1968, ECLI:EU:C:1968:14, I-0015, par. 156. Subsequently, private individuals were allowed to challenge regulations which in reality constituted a "faisceaux de decision

can be challenged when it is adopted against the appellant, whether a natural or legal person and/or when it concerns him directly and individually. In the second case this type of act is of a regulatory nature and does not require enforcement measures.

The expansion of judicial protection towards the activities of the institutions and bodies of the Union comes from the desire to avoid the interpretative difficulties surrounding the old jurisprudence of the Plaumann ruling (Craig, 2012; Craig, De Bùrca, 2021)[2]. There were many attempts to formulate conditions of admissibility that were not so rigid compared to the old jurisprudence (Moitinho de Almeida, 1995). We recall in particular the conclusions of Generar Advocate Francis Jacobs in the Unión de Pequeños Agricultores ("UPA") case[3] which marked a watershed in the jurisprudence on the matter[4] offering

individuelles", as stated in the judgment of the CJEU: 41-44/70, NV International Fruit Company and others v. Commission of the European Communities of 13 May 1971, ECLI:EU:C:1971:53, par. 411. Finally, the CJEU acknowledged that private regulations could be challenged by private individuals, even though they had to demonstrate that they, under the formal guise, actually concealed a decision: see the case: C-309/89, Codornìu SA v. Council of the Union of 18 May 1994, ECLI:EU:C:1994:197, I-01853.

2CJEU, 25/62, Plaumann v. Commission of the EEC 15 July 1963, ECLI:EU:C:1963:17, I-00199, par. 220. As you know, the CJEU has ruled that a natural or legal person can be considered individually concerned by a general act of which he is not the recipient "(…) only if the provision affects it because of certain personal qualities , or rather of particular circumstances to distinguish it from generality, and therefore identify it as the recipients (...)".

3CJEU, C-50/00 P, Unión de Pequeños Agricultores v. Council of 25 July 2002, ECLI:EU:C:2002:462, I-06677.

4It is with force that in point 4 it reads: "I will support the thesis according to which (...) the only solution to guarantee adequate judicial protection is to modify the jurisprudence on the subject of individual interest". 60 defines as follows: "(…) it should be admitted that a person is considered individually concerned by a Community act in the event that, due to the factual circumstances peculiar to him, such act prejudices or could substantially prejudice his interests".

a "theoretical" and not so practical starting point based on the interpretative and "innovative" solution which was formulated in the General Court (GC) ruling rendered in the Jégo-Quéré case (Coutron, 2002; Cassia, 2002; Slater, 2002; Biavati, Rasia, 2019)[5]. We can talk about a revirement which was then "mortified" by the Court of Justice of the European Union (CJEU) in the same UPA case, where the judges:

"(...) decided not to follow the indications of the General Advocate-which also envisaged a broader and more effective protection of individuals in the cases in which they were harmed by an act of general scope without the act identifying them as the recipients according to the Plaumann jurisprudence-preferring to remain faithful to the consolidated orientation (...)" (Amtenbrink , Vedder, 2021)[6].

The conclusions of the Advocate General in the UPA case and the ruling of the GC in the Jego Quéré case offered and opened a new path of strength towards the path that was the revision of the contractual provision in question. The Treaty that adopts a Constitution for Europe had already reshaped the conditions of admissibility of individual appeals:

"(...) through the revision of the provision dedicated to the appeal for annulment which will then converge in substantially identical terms in the current Art. 263 TFEU (…)" (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

According to the preparatory works of the so-called European

5GC, T-177/01, Jégo-Quéré et Cie SA v. Commission of 3 May 2002, ECLI:EU:T:2002:112, II-02365.

6The judges of last instance stated, inter alia, that it is for the Member States, "pursuant to the principle of loyal cooperation enshrined in Art. 5 of the EC Treaty (now art. 10 EC)", the task of setting up a system of jurisdictional remedies suitable for improving the framework for the protection of individuals (parr. 41). However, changing the interpretation of the notion of individual interest would in fact have led to a change in the conditions of access to justice as provided for in the founding Treaty, a task that does not fall within the competence of the "Community" judge, but of the states (parr. 44-45).

Constitution with the urgent need for reform, the reference to the adverbs “directly and individually” was carefully heard, which are considered, in the circle of the aforementioned jurisprudence which in reality was excessively rigid. The consolidated orientation has brought to attention a question that can no longer be postponed, namely whether the law of the time was really suitable and concrete to guarantee effective jurisdictional protection to private individuals, as we can read in the CJEU's UPA ruling itself as:

“(...) a sort of “hope” for the modification of the provision through the process of revision of the Treaties (...)” (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

The years have passed and now even today the question remains the same, i.e. the reference no longer to the relative requirement of individual interest but to the absence of implementing measures and the relative reference to the regulatory nature of the act which constituted the new legal perimeter offered by Lisbon to broaden the locus standi of non-privileged appellants which was appropriate to evaluate the actual effectiveness in broadening the scope of jurisdictional protection before the judges of the Union.

According to Art. 263, letter. 4, TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) some problems of an interpretative nature have arisen and affected the methods of application of the rule. The meaning of “regulatory act” was analyzed by the

judges of the Union through a ruling of the GC, confirmed by the CJEU which:

"(...) had the merit of making its interpretation now pacific: the notion of "regulatory act" includes any act of general scope with the exception of legislative acts (…)" (Craig, 2010; Creus, 2011; Wahtelet, Wildemeersch, 2012)[7]. The expression of "act" which does not entail any enforcement measures (Wahtelet, Wildemersch, 2012) is not fully defined by the Union judge. Accordingly, the CJEU despite the fact that it has not been the protagonist of numerous rulings it has not offer concrete and definitive clarifications of it. The protection of private individuals becomes problematic through the scope of the direct review against acts of general scope where the CJEU has not favored the literal formulation of the rule[8] by assuming a more concrete attitude and we can say quite coherent with a "system which recognizes as subjects not only the Member States, but also their citizens (…)" (Stein, 1981; Weiler, 1991; Vauchez, 2010; Egan, 2013; Rausmussen, 2014; Rodin, Perišin, 2015; Sankari, 2016; Maduro, Wind, 2017; Barnard, Peers, 2017; Nicola, Davies, 2017; Usherwood, Pinder, 2018; Lindseth, 2018; Rasmussen, Martinsen, 2019)[9].

7C-583/11 P, Inuit Tapiriit Kanatami and others v. Parliament and Council of 3 October 2013, ECLI:EU:C:2013:625, published in the electronic Reports of the cases. This decision was in line with the prevailing doctrinal orientation; an orientation which, moreover, had been made precisely by the General Advocate Juliane Kokott in her conclusions presented in the context of the same case in 17 January 2013.

8As will be seen, from the term "entail" to the substantial overlap of the conditions of direct impact and the absence of enforcement measures, the provision has margins of evident vagueness.

9CJEU, C-26/62, Van Gend & Loos v. Amministrazione olandese delle imposte of 5 February 1963, ECLI:EU:C:1963:1, I-00003. C-56/65, Technique Minière of 30 June 1966, ECLI:EU:C:1966:38, I-00337. C-43/71, Politi of 14 December 1971, ECLI:EU:C:1971:122, I-01039. joined cases C-162 and 258/85, Pugnaloni of 12 June 1986, ECLI:EU:C:1986:246, I-01885. C-267/86, Van Eicke/ASPA of 21 September 1988, ECLI:EU:C:1988:427, I-04769. Stein: arguing that a constitutionalist framework explains the early decisions interpreting the Treaty of Rome. Rausmussen: calling the constitutionalization of the Treaty a decisive turning point in the history of the European Court of Justice and of EU law in general. For a recent critique of the process of constitutionalization.

Interpretation of "acts not entailing any implementing measures"

The implementing measures pursuant to Art. 263, letter. 4 TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) is a vexed question of affirming whether in an orientation characterized by a certain univocity through jurisprudence both by the CJEU and the GC judges as inadmissible the appeals presented by private individuals against acts that have had a general scope or addressed to third parties of a regulatory nature. The absence of enforcement measures has had various interpretations in rigorous and stringent terms. The consequence and result is the inadmissibility of the appeals (Gutman, 2019)[10]. Accompanying

10GC, T-221/10, Iberdrola, SA v. Commission of 8 March 2012, ECLI:EU:T:2012:112, published in the electronic Reports of the cases. T-381/11, Europäischer Wirtschaftsverband der Eisen-und Stahlindustrie (Eurofer) ASBL v. Commission of 4 June 2012, ECLI:EU:T:2012:273, published in the electronic Reports of the cases. T-551/11, Brugola Service International Srl v. Council of 5 February 2013, ECLI:EU:T:2013:60, published in the electronic Reports of the cases. T-400/11, Altadis, SA v. Commission of 9 September 2013, ECLI:EU:T:2013:490, published in the electronic Reports of the cases. T-429/11, Banco Bilbao Vizcaya Argentaria, SA v. Commission of 9 September 2013, ECLI:EU:T:2013:488, published in the electronic Reports of the cases. T-380/11, Anonymi Viotechniki kai Emporiki Etairia Kataskevis Konservon-Palirria Souliotis AE v. Commission of 12 September 2013, ECLI:EU:T:2013:420, published in the electronic Reports of the cases. T-438/10, Forgital Italy SpA v. Council of 4 December 2013, ECLI:EU:T:2013:648, published in the electronic Reports of the cases. C-274/12 P, Telefónica v. Commission of 19 December 2013, ECLI:EU:C:2013:852, published in the electronic Reports of the cases. T-596/11, Bricmate AB v. Council of 21 January 2014, ECLI:EU:T:2014:53, published in the electronic Reports of the cases. T-601/11, Dansk Automat Brancheforening v. Commission of 26 September 2014, ECLI:EU:T:2014:839, published in the electronic Reports of the cases. C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v. Commission of 28 April 2015, ECLI:EU:C:2015:284, published in the electronic Reports of the cases. C-553/14 P, Kyocera Mita Europe BV v. Commission of 10 December 2015, ECLI:EU:C:2015:805, published in the electronic Reports of the cases. C-384/16 P,

this rigidity, it does not appear to be a process of interpretation of the rule (Lenaerts, Gutierrez Fons, 2020) useful for understanding the detail of the enforcement measures where the absence is necessary for the purposes of declaring the admissibility of the appeals. Various other questions that enter the interpretative circle of this provision certainly remain open, tracing a common thread that is consistent with jurisprudence by identifying acts that can even be defined as implementing measures.

"To behave, imply or contemplate"?

By carefully reading the jurisprudence in the case, some questionable notions emerge, such as not to behave. We remember the Generar Advocate Juliane Kokott in the conclusions of the Telefónica case (Buchanan, Bolzonello, 2015)[11], evaluating the considerations of Art. 263, letter. 4, TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) where the term "implies":

"(...) seems to take on value in terms of chronological succession (…). The act should imply subsequent measures (…) against a regulatory act which (…) does not entail implementing measures (…)" (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

European Union Copper Task Force v. Commission of 13 March 2018, ECLI:EU:C:2018:176, published in the electronic Reports of the cases. C-244/16 P, Industrias Químicas del Vallés SA v. Commission of 13 March 2018, ECLI:EU:C:2018:177, published in the electronic Reports of the cases.

11CJEU, C-274/12 P, Telefónica S.A. v. Commission of 21 March 2013, op. cit.

Thus we understand the distinction between the acts which:

"(...) already involve enforcement measures upstream and the acts which instead require further enforcement measures downstream, in the sense of considering that only the acts which involve subsequent enforcement measures cannot be challenged, while the acts which do not require further ones (because they have already been executed) are instead reviewable and, indeed, it would be difficult to understand the fact that they are not (...)" (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

In the Iberdrola case, the GC notes that:

"(...) for the purposes of the declaration of inadmissibility, to the fact that the decisions did not "contemplate" implementing measures when, instead, art. 263 (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) literally requires that the acts do not "involve" such measures (...)"[12].

The expression used here by the GC could be interpreted in the sense that:

"(...) a regulatory act may not provide (ab origine) enforcement measures-therefore not even in the abstract-while in the meaning of Art. 263, par. 4, TFEU, the literal wording would lead to a broader interpretation, namely that an act may not actually be followed by implementing measures (...)" (Amtenbrink, Vedder, 2021)[13].

These are measures that "normally follow the regulatory act"[14] as the GC stated in the Tilly-Sabco ruling, also referring to the term "entail", thus presenting a new interesting additional piece on which a firm point was missing. The GC stated that the word "conduct" must be taken into account in the literal meaning of the law. The GC provided an innovative interpretation as an important tool which in reality is based on and respects previous

12GC, T-221/10, Iberdrola SA v. Commission of 8 March 2012, op. cit., par. 45.

13GC, T-221/10, Iberdrola SA v. Commission of 8 March 2012, op. cit., par. 45.

14GC, T-397/13, Tilly-Sabco v. Commission of 14 January 2016, ECLI:EU:T:2013:502, published in the electronic Reports of the cases. T-434/13, Doux v. Commission of 14 January 2016, ECLI:EU:T:2016:7, published in the electronic Reports of the cases, par. 44.

jurisprudence where:

"(...) the execution of the act must take place by the bodies, offices or agencies of the Union or by the national authorities, in the normal course of (their) activity (...)"[15].

The authorities referred to do not adopt any measures that gave execution to the regulatory act and the realization of its effects given that the regulatory act does not "involve" any implementing measures. The GC continued its interpretative path by stating:

"(...) that it is not sufficient that the act can entail enforcement measures, but it is necessary that it entails them. What the judges of first instance have therefore suggested is that it should always be examined whether measures are adopted by the authorities, in the normal course of business, in order to implement the contested regulatory act (...)"[16].

The term "behave" came to an end in the context of the European Union Copper Task Force[17] affair. This is a case which concerned the challenge of an implementing regulation which was issued in implementation of a regulation of the Parliament and of the Council. The EU Copper Task Force's action was aimed at a partial annulment of a Commission implementing regulation[18] which implemented an article of a

15T-397/13, Tilly-Sabco v. Commission of 14 January 2016, op. cit., par. 43. It should be noted that the CJEU, in the context of pourvoi, case C-183/16, has in no way analyzed or taken into consideration the point proposed by the Court.

16T-397/13, Tilly-Sabco v. Commission of 14 January 2016, op. cit., par. 44.

17CJEU, C-384/16 P, European Union Copper Task Force v. Commission of 13 March 2018, op. cit., C-244/16 P, Industrias Químicas del Vallés SA v. Commission of 13 March 2018.

18Commission Implementing Regulation (EU) 2015/48 of 14 January 2015 entering a name in the register of protected designations of origin and protected geographical indications [Vinagre de Montilla-Moriles (PDO)] OJ L 9, 15.1.2015, p. 11–16. CJEU, C-244/16 P, Industrias Químicas del Vallés SA v. Commission of 13 March 2018, op. cit.

regulation of the Parliament and of the Council[19] relating to the placing of plant protection products on the market. The implementing regulation subjected the substances produced by the appellant to the regulation of the Parliament and the Council and led to the exclusion of the aforementioned substances from the market as they were toxic.

The term "entail" concerned the implementing measures which are adopted as the immediate basis of the regulatory act and: "(…) whether its scope could also be extended to acts adopted on the basis of a previous regulation (...)"[20].

In a literal, teleological interpretation and by virtue of the principle of legal certainty, the Advocate General Melchior Wathelet concluded by stating:

"(...) that the term "involve" must be interpreted in the sense that "it concerns only the measures of implementation necessarily adopted on the immediate basis of a regulatory act (...)"[21].

19Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p. 1-50.

20CJEU, C-384/16 P, European Union Copper Task Force v. Commission of 13 March 2018, op. cit., par. 46.

21Starting from the etymology of the French "comporter", that is "inclure en soi", Wathelet observed that a regulatory act that does not involve enforcement measures is an act whose implementation "does not require or require any complementary act" (par. 57). The term therefore needs an immediate causal link with the measure. The General Advocate went on to point out that, if the aim of the reform was to strengthen the judicial protection of individuals, then it is evident that excessively extending the interpretation of the condition relating to the presence of enforcement measures (considering that every single decision act or implementing measure) has the precise consequence of reducing the scope of the enlargement introduced with Lisbon (point 60). Finally, the more lax the link between the regulatory act and the execution measure, the more difficult it will be for the individual to understand whether or not he is authorized to challenge the first (par. 62). This uncertainty would have precise consequences also in systematic terms: "compel" the uncertain private individual to challenge the national measure (if, inter alia, this is possible) and then make a preliminary reference against the original regulation, although a procedural choice often requested by the CJEU, could conflict with the TWD judgment, which aims to

The judges of the CJEU stated:

"(...) that the wording of Art. 263, letter. 4, TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) (...) does not require, for a measure to be qualified as a measure implementing a regulatory act, that such act constitutes the legal basis for this measure. The same measure can be a measure implementing both the act whose provisions constitute its legal basis and a different act, if the legal effects of the latter will be produced, in whole or in part, against the appellant party, only through this measure (...)"[22].

The CJEU has moved towards other broader hermeneutic boundaries, admitting that an act can entail various enforcement measures even if these are of a different act. The logic used by the judges was that the previous regulation does not in itself entail implementing measures and as a consequence the subsequent regulation entails implementing measures, therefore the former which produces its effects through the latter includes measures of execution.

Subject of the appeal, interpretation of the rule and reference to the appellant's position

The implementation measure gave rise to some precepts, i.e. the notion of a theological interpretation of the norm in question. Taking an aspirational basis from the conclusions of the

prevent the private individual from being able to oppose the execution of an act before the national court, pleading its illegality and thus circumventing the definitive nature of this against him after the expiry of the terms of appeal.

22CJEU, C-244/16 P, Industrias Químicas del Vallés SA v. Commission of 13 March 2018, op. cit., C-384/16 P, European Union Copper Task Force v. Commission of 13 March 2018, op. cit.

Advocate General Kokott in the Telefónica case which highlighted that they do not seem to have been really explored and dissected by the judges since they have resemble pre-packaged formulas that exhausted in themselves. In reality they tried to maintain their relevance for the purposes of an attempt to reconstruct the notion in question, as well as the term "behave".

The first interpretative criterion proposed by the CJEU has to do with the purposes of the examination aimed at establishing in our opinion whether the act contested by private individuals involves some enforcement measures and it is therefore necessary to refer solely to the subject of the appeal where the evaluation of the judge, but also of the interpreter in this case cannot and must not make mistakes regarding aspects of the contested act which are of an "accessory" nature and clearly distinct while respecting the main object of the act itself. This evaluation allows us to arrive at a focus of the investigation which determines some deviations which include a successful outcome of the verification of the presence of enforcement measures. The decision on the admissibility of an appeal brought by non-privileged appellants will be the task of the judge to limit his analysis to the main object of the appeal only and then limited to this in the case in which the regulatory act entails enforcement measures or not. Thus, an ancillary

distinction is taken into consideration by the contested decision which constitutes an error of law.

According to a teleological interpretation of the rule applied in light of the objective of the provision, it has as its basis to prevent the individual from being forced to violate the law in order to access the judge. Of course, the fact remains open that the private individual, in order to contest the validity of an act of the EU before a national judge, given the impossibility of appealing for annulment as formulated and interpreted in Art. 230 EC (Amtenbrink, Vedder, 2021) must first have violated the provisions contained by possibly objecting to the illegitimacy of the act as a type of defense to a proceeding instituted against him (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

This type of interpretative broadening is based on the requirement of the absence of implementing measures that must be carried out. The requirement in question should be interpreted according to the regulatory nature which produces its effects directly without the need for implementing measures. This was the rationale of the Treaty of Lisbon in relation to the active legitimation of private individuals in the sense that an act which in itself produces the effects on the individual justifies a direct appeal. Legal effects as an act of general scope produces a definition of effects with respect to general and abstract

categories of subjects. The abstract legal effects of an act arise as a basis for the mere application of the rule and are not sufficient to consider that an act does not require other implementing measures. The legal effects of a general and abstract act are decisive for the individual and must be precise and defined so as to be suitable in themselves to directly and exclusively affect the legal sphere of each individual, justifying the recognition of active legitimacy. If this is not the case, further measures will need to be used for specific enforcement measures.

The verification whether the contested act entails enforcement measures must refer exclusively to the position in which the right is invoked, i.e. the fact that the contested regulatory act entails enforcement measures for other subjects becomes irrelevant to the appellant[23]. Thus the hypothesis must be verified that the contested regulatory act entails enforcement measures against other people but not for the appellant who is entitled to present his appeal. Thus it is not possible to reach a cognitive-interpretative solution that is complete but it also allows us to better understand that the rulings have marked through jurisprudence on the topic which is thus better to guide the activity of the interpreter as well as the choices of the appellant.

23CJEU, C-274/12 P, Telefónica v. Commission of 19 December 2013, op. cit., par. 30.

(Follows). National implementing measures

The question that arises from jurisprudence and from what we have understood and examined so far is whether enforcement measures can be adopted at national level or within the EU? (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021). We have already understood from the Telefónica ruling that the two hypotheses are considered equivalent and a regulatory act involves implementing measures. A judicial review of compliance with the Union's legal order is guaranteed regardless of the question whether such measures come from by the Union or the Member States[24]. The implementation of the acts is under the responsibility of the institutions, bodies, offices or agencies of the Union, the natural or legal persons who can lodge an appeal and directed before the courts of the Union under the conditions established in Art. 263, letter. 4, TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) in a way to deduce the illegitimacy of the act pursuant to Art. 277 TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021). Implementation is up to the Member States who can assert the invalidity of the Union act before national judges by requesting the latter and by consulting the CJEU by

24CJEU, C-274/12 P, Telefónica v. Commission of 19 December 2013, op. cit., par. 28.

submitting preliminary questions according to Art. 267 TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

Discretionary and constrained execution

The "conduct of implementing measures" require such a measure to be such and totally restricted in its content. The T&L Sugars ruling[25] is the first case in which the CJEU has addressed the issue relating to the correct interpretation of the new conditions of admissibility of direct appeals which have to do with challenging the legitimacy of a regulatory act:

"(…) forcing the Board to consider the problems that the case presents, including those that the judge would prefer not to be touched upon (...)"[26].

The Advocate General Cruz Villalón induced the CJEU:

25CJEU, C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v. Commission of 28 April 2015, op. cit., "(…) although the CJEU has already defined the notion of a regulatory act within the meaning of the provision in question-in particular in the sense that it does not include legislative acts-on the other hand, it has not yet had the opportunity to examine, at least in positive terms, the twofold condition that makes the legitimacy of natural or legal persons to act against this type of act subject to the fact that the latter concern them directly and do not involve any enforcement measures beyond direct impact (…)", (par. 17).

26CJEU, C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v. Commission of 28 April 2015, op. cit., par. 30.

"(...) to take into consideration the paradigm of "discretion" (…)" (Mak, 2012; Saffian, Düsterhau, 2014; Öhlinger, 2014; Lebrun, 2016)[27].

The notion of "implementing measure" according to the T&L Sugars judgment appears to include any measure, whether European or national, giving the relevant implementation and enforcement of a regulatory act, regardless of whether the authority giving the relevant enforcement enjoys a certain discretion on the content of this act. The adoption of this measure is automatic or fully discretionary[28]. This interpretation is still unsatisfactory (Buchanan, Bolzonello, 2015; Mastroianni, Pezza, 2015; Meij, 2015)[29]. The notion of enforcement measure is broadened in its interpretation which includes every form of act even of a negligible nature, as well as the exercise of the right of action of individuals makes it difficult, also regarding

27Strengthened by an argument of a semantic nature, the Generar Advocate affirmed (par. 30) that the term: "(...) "measure" involves by its very nature the fulfillment of a power and, therefore, a certain degree of discretion in the exercise of this public power. The fact that a national public authority adopts an act does not in itself imply that this is necessarily an enforcement measure. It is therefore important, for the purposes of analyzing the dual condition referred to in the article in question, and in particular the second, to take into account "in concrete and in any case, the nature, the form of the intensity of the collaboration requested by the of the national authority". This in the sense that it seems difficult for Villalón to recognize that an act, so to speak, "ancillary", which is part of any activity, can really be considered as the obstacle that stands between the individual and his right to access to community justice (…)".

28This was considered, in the appellants' first ground of appeal before the CJEU, an error of law committed by the Court in the first instance judgment, C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v. Commission of 28 April 2015, op. cit., in the interpretation of the concept of "regulatory act which does not provide for running". A second error of law that the Court would have committed, as stated in the appeal, would also have been the restrictive interpretation of art. 263, paragraph 4, TFEU, contrasting this with the right to effective judicial protection pursuant to art. 47 CFREU.

29CJEU, C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v. Commission of 28 April 2015, op. cit.

the delicate hypothesis of Art. 263, letter. 4, TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

We see the interpretation proposed by the CJEU in the T&L Sugars case confirmed also in the EU Copper Task Force and Industrias Químicas cases, reaching the paradoxical point in which on many occasions it would be impossible for private individuals to benefit from the new conditions of admissibility of appeals that were established with the aim of attenuating rigid access to justice. According to the Advocate General Melchior Wathelet in the Stichting Woonpunt v. Commission case[30]

"(...) the hypothesis arises that simple formalities, such as a publication, a notification, a confirmation or a reminder, even if merely optional, can be considered enforcement measures and, therefore, hinder individuals' access to the Union judge (...) to exclude from the notion of implementing measures the acts adopted by the national authorities which do not involve any form of discretion on their part, stating, for example, that the acts which are the mere execution of the instructions contained in a regulatory act or which simply represent the logical consequences of this, should not compromise the possibility of challenging the act with the benefit of the conditions provided for in the last part of the fourth paragraph of the article in question (...)" (Gormley, 2013 ; Gormley, 2014; Lazowski, Blockmans, 2016).

This interpretation classifies an act as an implementing measure necessary to verify whether the authority enjoys the relevant margin of discretion in the implementation of a Union act[31]. In

30Conclusions of the General Advocate in the case: C-132/12 P, Stichting Woonpunt v. Commission of 29 May 2013, ECLI:EU:C:2013:335, par. 72, published in the electronic Reports of the cases.

31In this sense see the conclusions in the Stichting Woonpunt case: C-132/12 P, Stichting Woonpunt v. Commission of 29 May 2013, op. cit., par. 68, which states that "the discretion of the author of the intermediate act aimed at implementing the Union act cannot be merely formal". See also par. 163 of the case of the GC: T-16/04, Arcelor SA v. European Parliament and Council, ECLI:EU:T:2010:54 of 2 March 2010, II-00211, where it is recalled that the directives that leave ample discretion to

the T&L Sugars case the CJEU responded by underlining:

"(...) that the absence of discretion on the part of the authorities in implementing the act is a criterion that must be examined in another context; that is, in the context of verifying the presence of direct interest. The new requirement provided for by Art. 263, letter. 4, TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021), (...) would constitute a different condition with respect to the issue of discretion. The alleged "mechanical nature" of the measures adopted at national level, therefore, as the CJEU argued, would only be relevant "in the phase in which it is assessed whether the appellants are directly affected by the regulations in question (...) without relevance in order to determine whether the same regulations entail enforcement measures (...)"[32].

The notion of "act which does not entail any enforcement measures" has followed yet another additional type and expanded through the relevant jurisprudence recalling the Montessori case (Wildemeersch, 2019)[33]. The CJEU examined the question of the admissibility of direct appeals:

"(...) which are brought by competitors of beneficiaries of a state aid scheme against a Commission decision declaring that (i) the Italian municipal tax scheme single "IMU" does not constitute state aid and that (ii) aid granted on the basis of an illegal regime (i.e. the exemption from the municipal property tax "ICI" granted by Italy to non-commercial entities) cannot be recovered

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the Member States do not meet the requirement of the absence of implementing measures.

32GC, T-381/11, Europäischer Wirtschaftsverband der Eisen-und Stahlindustrie (Eurofer) ASBL v. Commission of 4 June 2012, op. cit., which is affirmed that: "It should be noted that the question of whether or not the contested decision leaves discretion to the enforcement authorities is irrelevant. Indeed, it is true that the absence of discretion is a criterion to be examined in order to ascertain whether the condition of direct impact on an applicant is met. However, the requirement of an act which does not entail any implementing measure provided for in the fourth paragraph of Article 263 TFEU constitutes a condition other than that relating to direct effect (...)".

33CJEU, joined cases C-622/16 P to C-624/16 P, Scuola Elementare Maria Montessori Srl v. Commission, Commission v. Scuola Elementare Maria Montessori Srl and Commission v. Pietro Ferracci of 6 November 2018, ECLI:EU:C:2018:873, published in the electronic Reports of the cases. In the same spirit of orientation see also the next case: C-331/20 P, Volotea v. Commission of 17 November 2022, ECLI:EU:C:2022:886, not yet published.

(...)".

The preliminary ruling demonstrated the complexity and importance of the issues addressed, suggesting the existence of valid and precise prerequisites for sections made up of five or three judges to be able to conform to the content of the ruling.

From a procedural point of view, the ruling presents some new interpretative ideas given that it specifically concerns:

"(...) the part of the contested decision in which the Commission had not ordered the recovery of the aid considered illegal and incompatible with the internal market (...) they did not limit themselves to ruling that it did not entail any enforcement measure tout court, but more rigorously maintained that "it did not require any enforcement measure against them which could be subject to judicial review before the Union or the national judges (…)" (Gasso, Sauron, 2021)[34].

Equally important, at a national level, is that private individuals may encounter difficulties that go as far as the impossibility of appealing in relation to the measures for implementing the contested act. The national procedural system provides, despite in Art. 19, par. 1, second sentence, TEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021), a system of jurisdictional remedies that ensure the challenge of any type of legal act including those which the CJEU defines as enforcement measures. The judges have paid attention to the possibility that the enforcement measure can be reviewed before the Union and/or national courts, allowing it to be stated that this interpretation is not only

34CJEU, joined cases C-622/16 P to C-624/16 P, Scuola Elementare Maria Montessori Srl v. Commission, Commission v. Scuola Elementare Maria Montessori Srl and Commission v. Pietro Ferracci of 6 November 2018, op. cit.

teleologically oriented, but also a precise expression of the law in relation to judicial protection effective according to Articles 6 and 13 of the European Convention of Human Rights (ECHR) (Van Aaken, Motoć, 2018; Van Dijk, Van Hoof, Vamn Rijn, Zwak, 2018; Nussmerger, 2020; Villiger, 2020; Kosař, Petrov, Šipulovà, Smekal, Lyhnànek, Janovský, 2020; Villiger, 2023), Art. 47 Charter of the Fundamental Rights of the European Union (CFREU) and the principle of effectiveness (Liakopoulos, 2017)[35].

Regarding the position of the Commission for the exemption of the IMU it did not enter within the context of state aid according to Art. 107 TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli,

35Although the CJEU of justice, through its work, has always paid formal attention to this issue, giving it high dignity, with respect to the issue examined in this work, i.e. the limits to the legitimacy of private individuals to act, it has repeatedly considered not being able to affect the provisions of primary sources and, in some cases, has even ruled out that the issue concerned a problem of the effectiveness of judicial protection, as, for example, in the UPA judgment: CJEU, C-50/00 P - Unión de Pequeños Agricultores v. Council of 25 July 2002, op. cit., par. 45. On the principle of effectiveness read in the sense of protecting the legal position of the individual in the context of the process and, therefore, of "[guarantee of effective judicial protection", see, for example: CJEU, 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland of 16 December 1976, ECLI:EU:C:1976:188, I-01989. C-199/82, Amministrazione dello Stato v. SpA San Giorgio of 9 November 1983, ECLI:EU:C:1983:318, I-03595, par. 14. C-222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary of 15 May 1986, ECLI:EU:C:1986:206, I-01651. C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn of 21 February 1991, ECLI:EU:C:1991:65, I-00415. C-6/90 and C-9/90, Andrea Francovich e altri contro Repubblica italiana of 19 November 1991, ECLI:EU:C:1991:428, I-05357. C-147/01, Weber's Wine World Handels-GmbH and others v. Abgabenberufungskommission Wien of 2 october 2003, ECLI:EU:C:2003:533, I-11365, par. 103. C-432/05, Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern of 13 March 2007, ECLI:EU:C:2007:163, I-02271, par. 37.

2021) therefore the CJEU states that:

"(...) the acts implementing the national provisions establishing aid (such as a notice of assessment) constitute implementing measures[36] is not applicable to the situation of competitors of beneficiaries of a national measure which has been considered not to constitute state aid (…). The situation of such a competitor is different from that of the beneficiaries of aid covered by this same jurisprudence, since said competitor does not satisfy the requirements established by the national measure in question to be able to benefit from the same (...)"[37].

According to the conclusions of the Advocate General Wathelet[38], the CJEU noted:

"(...) that in the present case it would be artificial to oblige (the) competitor to ask the national authorities to grant him this benefit and to challenge the act of rejection of said application before a national judicial body, in order to induce the latter to question the CJEU regarding the validity of the Commission's decision relating to the aforementioned measure (...)"[39].

The orientation proposed by the Advocate General Jacobs in the conclusions to the UPA case according to our modest opinion the judges "introduced the brand new concept of artificial litigation".

At a terminological level the concept of "artificial litigation" was specified in the related changes introduced by Lisbon treaty, i.e. to prevent the individual from being forced to initiate

36CJEU, C-274/12 P, Telefónica v. Commission of 19 December 2013, op. cit., parr. 35-36. C-132/12 P, Stichting Woonpunt v. Commission of 29 May 2013, op. cit., parr. 52-53. C-133/12, Stichting Woonlinie and others v. Commission of 27 February 2014, ECLI:EU:C:2014:105, published in the electronic Reports of the cases, parr. 39-40.

37C-133/12, Stichting Woonlinie and others v. Commission of 27 February 2014, ECLI:EU:C:2014:105, published in the electronic Reports of the cases, parr. 39-40.

38CJEU, joined cases C-622/16 P to C-624/16 P, Scuola Elementare Maria Montessori Srl v. Commission, Commission v. Scuola Elementare Maria Montessori Srl and Commission v. Pietro Ferracci of 6 November 2018, op. cit.

39CJEU, joined cases C-622/16 P to C-624/16 P, Scuola Elementare Maria Montessori Srl v. Commission, Commission v. Scuola Elementare Maria Montessori Srl and Commission v. Pietro Ferracci of 6 November 2018, op. cit., par. 66.

proceedings before the national judge with the final objective of involving the CJEU through a preliminary ruling on validity.

The judges based themselves on a teleological interpretation oriented by Art. 263, letter 4 TFEU have distanced themselves from the consolidated jurisprudence that was valid before the Treaty of Lisbon by trying to take steps forward according to the new data they have had in their hands (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

Absence of enforcement measures and overlapping conditions

Direct interest and the absence of enforcement measures is a topic that requires a point of investigation. The direct interest required in relation to acts without a regulatory nature remains a requirement of individual interest. A claimant can be directly affected by an act only if this act "produces in itself the immediate effect of depriving him of a right or imposing an obligation on him"[40], and without the intervention of implementing measures of an intermediate nature[41]. Regulatory acts come in and ask for a direct interest which is accompanied ex lege by the need for the act not to entail enforcement

40CJEU, C-486/01 P, Front national v. Parliament of 29 June 2004, ECLI:EU:C:2004:394, I-06289, par. 24.

41CJEU, C-100/74, Société CAM SA v. Commission of the European Communities 18 November 1975, ECLI:EU:C:1975:152, par. 14.

measures. The emerging question is what is the relationship between two conditions? Can we talk about overlap or satisfaction of additional requirements?

Regulatory acts include a direct interest that implies the satisfaction of other, additional requirements and perhaps other than those that enter into the absence of implementing measures which could occur the risk of reaching an inappropriate result according to the ratio of the treaty of Lisbon and the requirements for the admissibility of appeals[42].

We can say that the notion of direct interest is superimposable "if does not entail enforcement measures, then the rule could appear redundant". The said notion also combines these two requirements as a specification[43].

By precisely distinguishing these two requirements we can say that the CJEU had the opportunity to clarify that the absence of discretionary power is an element that can only be assessed for the purposes of the direct interest which enters into the sphere of the appellant's sphere and is represented as a different requirement where the act must not entail enforcement measures[44]. Perhaps we are faced with a pleonastic phenomenon

42In the sense of not changing the interpretation of the notion of "direct interest" as it appeared in Art. 230, TEC to attest to the will of the constituents of Lisbon to "open the conditions for the presentation of direct appeals", T-262/10, Microban International Ltd e Microban (Europe) Ltd v. Commission of 5 October 2011, ECLI:EU:T:2011:623, II-07697.

43On the contrary, however, of what happens in the interpretation of art. 260, par. 2, TFEU, where the "or" interposed between the lump sum and the periodic penalty payment has a conjunction value.

44CJEU, C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v.

of a double reference to the possibility of being challenged by private entities and of regulatory acts which directly concern and involve the enforcement measure. Thus it is also difficult to admit that the condition of the absence of implementing measures differs in stricto sensu from that of direct interest by requiring that the regulatory act produces the relevant effects on the appellant directly and without the aid of decisions, acts or media measures. According to the doctrine:

"(...) the two requirements (...) are difficult to explain on a legal level, since the direct interest is resolved precisely in the circumstance that the production of the effects of the act on the legal assets of the individual is not subordinated to further acts of implementation, neither at community level nor at national level (…)" (Koch, 2005; Creus, 2011; Chèrot, Cimamonti, Tranchant, Trèmeau, 2013; Blatière, 2014)[45].

To give a concrete answer to the title of this paragraph we must say that we are oriented towards a substantial overlap but in the same requirement.

Of equal importance, from the GC is the Microban case that we see a repetition of the two conditions that are not corresponding having carried out an analysis that exists in the direct and proper interest by evaluating and verifying whether the act involves enforcement measures or not[46]. Thus, a partial overlap of the two requirements that links them is confirmed. We recall the conclusions of the Advocate General Cruz Villalón in the T&L

Commission of 28 April 2015, op. cit., parr. 41-42.

45Koch: believed that the last condition of paragraph 4 of Article 263 TFEU should have a further meaning, additional to the direct interest, even if they did not finally specify which one.

46CJEU, C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v. Commission of 28 April 2015, op. cit., parr. 32-46.

Sugars case who spoke to us for a functional, concrete or rigid division between the two conditions:

"(...) between the definition of the norm as such and the definition of the circle of its recipients (therefore the direct interest) and the determination of a set of circumstances specifically inherent to its concrete application and its execution[47] (...) (modal, temporal, quantitative circumstances) which would allow us to affirm whether the rule is fully and autonomously operational. The direct interest would therefore exclusively refer to the definition of the norm and, above all, to the determination of its recipients; while the implementing measures, on the other hand, would be necessary for the sole purpose of evaluating the autonomous operation of the rule towards the recipients, who however have already been defined through the condition of direct interest (...) if this interpretation was actually followed, only at the end of an essential "concrete" analysis of the object, content and effects of the contested regulatory act on the sphere of the appellant could it possibly be concluded that it entails implementation measures pursuant to Article 263, letter 4, last part of the sentence, TFEU (...)"[48].

As we can understand, the Advocate General has fascinated us through a more solid theoretical rhetoric point of view but not so much practical where the functional definition describes a pragmatic and implementing procedure that leaves large doubts about certainty.

The Advocate General Cruz Villalón and Melchior Wathelet (as we noted in the T&L Sugars and Stichting Woonpunt cases) have already held that the two requirements can result in a mere repetition of the same condition. The GC and the CJEU incompletely repeat:

"(...) the requirement provided for in Article 263, letter 4, last part of the sentence, TFEU (…) (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021), i.e. the fact that the act

47CJEU, C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v. Commission of 28 April 2015, op. cit., parr. 32-46.

48CJEU, C-456/13 P, T & L Sugars Ltd e Sidul Açúcares, Unipessoal Lda v. Commission of 28 April 2015, op. cit., par. 53.

does not entail implementing measures, constitutes a different condition from that relating to direct interest and that the question of whether or not the contested regulation leaves a margin of discretion to the national authorities responsible for enforcement measures is not relevant to determine whether that regulation entails enforcement measures (...)"[49].

Article 19, par. 1 TEU and Art. 261, letter. 4 TFEU. Towards a system of completeness of the jurisdiction system of the EU

The reorganization of rules have made it possible to speak for the principle of effectiveness as the right to effective judicial protection and as provided for by Art. 19, par. 1 TEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

According to the article:

"Member States shall establish the judicial remedies necessary to ensure effective judicial protection in the area of Union law" (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021)[50]. The task was to "provide a system of judicial remedies and procedures aimed at guaranteeing respect for the right (of individuals) to effective judicial protection (...)"[51].

49GC, T-438/10, Forgital Italy SpA v. Council of 4 December 2013, op. cit., par. 44. C-132/12 P, Stichting Woonpunt v. Commission of 29 May 2013, op. cit., parr. 42. C-274/12 P, Telefónica v. Commission of 19 December 2013, op. cit., par. 19.

50See art. I-29 of the Treaty adopting a constitution for Europe where, in the first paragraph, we read: "(…) the CJEU includes the CJEU of European justice, the Court and the specialized courts. It ensures respect for the law in the interpretation and in the application of the Constitution. Member States shall establish the necessary remedies to ensure effective judicial protection in the field of Union law (…)".

51GC, T-177/01, Jégo-Quéré et Cie SA v. Commission of 3 May 2002, op. cit., par. 31.

The ratio of the article is an expression inspired by the principle of loyal collaboration according to Art. 4, par. 3 TEU (Neframi, 2013)[52] noting a voluntary force of a counterbalancing in place of the action for annulment brought by the non-privileged appellants and according to a restrictive interpretation based on Art. 263, letter. 4, TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021). We can understand that the article allows us to understand a positive responsibility of the Member States who are ready to ensure the work of their own bodies, not only judicial but also legislative, where the completeness of the remedies within the jurisdictional system of the Union is a fact that requires at an internal level the judges to give adequate forms of protection in individual concrete cases that the legislator himself modifies or introduces the regulation suited to the standards of protection required at European level. The protection of the rights of natural and legal persons can take place not only through an expansion of the system of direct access to the courts of the EU but also through an adequate procedural instrument in favor of private individuals in the domestic context. A type of collaboration between the level of the Union and national law should guarantee a more complete

52On the idea of including the principle in question in the same provision that outlines the principle of loyal cooperation, so as to determine a positive obligation of the Member States of close collaboration and a negative obligation to abstain from any measure that undermines the achievement of the objectives Union.

system in the jurisdictional sector of the European Union (Lenaerts, 2007; Lenaerts, Maselis, Gutman, 2014; Roeben, 2020)[53]. This type of completeness is based on the availability of the individual at least to a procedural remedy, whether European or national, and against acts of the institutions that are presumed to be illegitimate. This completeness is guaranteed at a regulatory level by the relevant articles which refer to non-privileged appellants, i.e. through Art. 263, letter. 4 TFEU and Art. 19, par. TEU[54].

Within this context the jurisprudence proposed by Art. 263, letter. 4 TFEU and above all from the implementing measure makes us understand and consider that the access to justice of the so-called de facto non-privileged appellants is restrictive at the European level as well as at the national level it becomes difficult given that the private individual obtains effective jurisdictional protection (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021). Art. 19, par. 2 TEU after the Treaty of Lisbon has determined a further step about what happening at a national level and in particular at a legislative level, i.e. the obligation that is not fulfilled with the result of hindering private parties

53CJEU, C-294/83, Les Verts v. Parliament of 24 April 1986, ECLI:EU:C:1986:166, I-03319, par. 23.

54As pointed out several times by the CJEU of justice, the first time in the Les Verts case, with articles 263 and 277 on the one hand and with art. 267 on the other hand, the Treaty "established a complete system of legal remedies and procedures". C-294/83, Les Verts v. Parliament of 24 April 1986, op. cit., par. 33.

from an adverse appeal given that contested acts and the respective implementing measures are not exactly competent to pronounce the relative annulment, rectius the reservation of jurisdiction of the CJEU over the acts of the EU. It is not necessarily conclusive that the internal procedural system provides according to Art. 19 TEU a system of remedies so as to allow you to challenge any type of legal act among which the CJEU has defined as enforcement measures (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

This statement allows us to recall the Forgital[55] case, where the GC has found:

"(...) that the regulation contested by the appellant company, as a result of which it would no longer benefit from the temporary suspension of the autonomous duties of the common customs tariff for the industrial products it imported into Italy, entailing enforcement measures at the moment in which the collection of customs duties relating to the aforementioned products should have been carried out on the basis of measures adopted by the customs authorities of the Member States (…)".

The contested regulation could have produce concrete and definitive legal effects towards the importer concerned. The national customs authority should in all cases have adopted certain national measures following the submission of the customs declaration made by the same importer. The company should have indicated that it did not be able to benefit from the suspension of duties, instead reporting the customs regime.

55GC, T-438/10, Forgital Italy SpA v. Council of 4 December 2013, op. cit.

Following a verification by the customs authority of the declarations written by the importer (consisting of a simple documentary check regarding the declaration and the documents attached to it, or in an examination of the goods, possibly accompanied by a sampling for the purposes of analysis or in-depth control) if no non-compliance had been ascertained, the authority would have granted the release of the goods with results that differed from what was stated in the customs declaration. The customs authority could have requested the payment of duties for an amount different from that indicated in the customs declaration via a communication. The measures to be adopted following the customs declaration could therefore consist, depending on the case, pursuant to art. 221 of the customs code, in granting the release of goods or in communicating to the debtor the amount of duties to be paid[56].

The case in question assumes a character of primary importance given that it imposes on the interpreter the problem that respects the mere qualification of an act as enforcement measures. That is, the problem of the lack of judicial protection at the national level since this "act" cannot be challenged according to national procedural rules. In the case just examined, the appellant claimed that it would not have been recognized as having an interest in taking action against a declaration prepared and

56GC, T-551/11, Brugola Service International Srl v. Council of 5 February 2013, op. cit., par. 53.

accepted by the customs authorities. Simply put, the only hypothesis in which an appeal could be lodged at national level would have been in the case:

"(...) in which the customs declaration contained errors, omissions or irregularities. The issue evidently raises profound questions, which highlight the practical obstacles that surround and limit the efficiency of the system outlined by the combined provisions of Articles. 263, letter. 4, TFEU and 19, par. 1, second sentence, TEU (...) (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021), on which unfortunately the CJEU has not yet had the opportunity to express itself, since which, in the Forgital case, declared that the ground of appeal proposed by the appellant was manifestly inadmissible as it was a new ground (...)"[57].

Concluding remarks: Towards an effective expansion of the legitimation of appeal by private entities

From the previous paragraphs we have noticed and understood that for yet another time in the context of the EU the interpretation of the articles was based on the relevant jurisprudence. In particular, in the present case, the legitimation of private individuals to take action through an action for annulment is a more appropriate path which profoundly affects the architecture of the system of judicial protection of individuals. The GC, as well as the CJEU, allowed us to understand the steps of the gradual development of the regulatory framework dedicated to direct appeals in non-privileged appellants, also enunciating the notable consequences for the legal sphere of the same. The restrictive or non-

57GC, T-438/10, Forgital Italy SpA v. Council of 4 December 2013, op. cit., par. 64.

restrictive interpretation used of the conditions of access to justice and the enunciation of basic principles on the topic has changed the fate of the rights asserted by individuals, thus determining whether or not it is difficult to obtain effective judicial protection.

Thus the strong limits imposed by the formulation of Art. 263, letter 4 TFEU are highlighted to us (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) with a jurisprudence that is not very extensive but concrete and full of doubts and large issues always under discussion. The regulatory act limits only non-legislative acts of general scope, also supporting valid arguments that today are considered consolidated jurisprudence. The interpretation of the enforcement measure is very controversial and perhaps ambiguous given that the cases of the CJEU that we have examined are certainly fewer in number than the interpretation provided which is not yet satisfactory recognizing the innovative scope of the Montessori ruling hoping for a paradigm that be declined again in different areas while also respecting state aid[58].

58It should be noted that, today, it is possible to find two rulings which, made in matters other than that of state aid and subsequently issued to Montessori, have embraced the consolidated orientation and declared the appeal inadmissible: T-125/18, Associazione Nazionale Granosalus v. Commission of 14 february 2019, ECLI:EU:T:2019:92, published in the elecrtronic Reports of the cases, on public health: C-204/18 P, Asociación de la Pesca y Acuicultura del Entorno de Doñana y del Bajo Guadalquivir v. Commission of 16 May 2019, ECLI:EU:C:2019:425, published in the electronic Reports of the cases, on the environment. As is evident, these are different sectors than state aid and, for this reason, it is legitimate to ask whether the revirement inaugurated with Montessori does not run the risk of remaining limited to this area.

An implementation measure without too many certainties must follow the regulatory act which temporally places a subsequent moment with respect to the issuing of the regulatory act itself. The execution of the act must take place by the bodies, i.e. bodies of the Union or by national authorities in the normal course of their activities. The authorities do not adopt measures aimed at implementing the regulatory act and realizing the effects, given that the regulatory act does not entail any implementing measures. It is irrelevant whether the effects that the European or national authority enjoys with discretion on the content of the implementing act and in the same nature can be a measure implementing both the act and the provisions that constitute a legal basis and a different act when the legal effects are produced against the appellant and only through this measure.

The object of the appeal is clear and not linear. From a practical point of view we can say that greater clarity on the topic is not irrelevant. It allows significant progress in terms of legal certainty and judicial protection which we can define as effective. The envisaged application of the rule determines a peaceful interpretation of the notion in question which leads to greater efficiency of the action of legal operators.

We have already noticed an effective and well-prepared system for the protection of private individuals but the framework is not

yet perfected. The identification of articles 277 and 267 and the alternative remedies (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) to the direct appeal provided for by Art. 263 TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) allows us to object that these are not equivalent at all. The preliminary ruling is a means of cooperation between European and national judges which is intended for the protection of individuals as we understand from the procedural rules regarding the exchange of briefs and management of the oral phase. It inevitably allows national judges to rule on rights protected by Union law which contains the risk of a non-homogeneous application of EU law (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021).

The restrictive interpretation of Art. 263, lett. 4 TFEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) linked to the absence in the Member State of the judicial remedies necessary to challenge the national enforcement measure according to Art. 19, par. 1 TEU can deprive the individual of effective judicial protection, thus providing evidence of a completion of the European judicial system based on the principle of loyal cooperation between the Union and Member States which in

reality this aspiration has not yet been perfectly achieved. The possible opening of an infringement procedure against the state which does not provide for the relevant jurisdictional remedies according to Art. 19, par. 1, TEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) is a possible investigation topic within the national scope of subjecting the controversial enforcement measure to the effects to which can refrain from considering this statement as an obiter dictum.

With the help of Art. 230 TEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) we can seen the relative contraction of the legitimacy for the challenge of private subjects. This ascertainment far exceeds the Plaumann case. Paradoxically the related situation created with the Treaty of Lisbon formulates a rule of dubious clarity of the term entailed in relation to the conditions of direct interest and with the lack of enforcement measures interpreting strongly and restrictively that the CJEU has given shape to new interpretations (Lenaerts, Gutierrez Fons, 2020). De jure the prerequisites for an effective expansion of the legitimacy to appeal are undoubtedly placed on a single restrictive approach which is adopted by the CJEU where de facto it has prevented them from being strengthened. The final objective as well as the main purpose was to broaden private

individuals' access to justice but within the limits of what is the most general ratio of the legitimation to act, i.e. to prevent opening the doors to the so-called actio popularis which allows non-privileged appellants to attack all acts of general application[59]. This is a jurisdiction of legitimacy not to protect subjective law, but rather the objective law[60]. The protection of private individuals and the desire to limit the ability to access justice means that the number of appeals is reasonable. A subtle and necessary balance is considered the presumption unlike the Member States and the Institutions where the appeal presented by natural and legal persons is not determined by the interest in the legality of the system and the commitment that a democratic legal system is coherent and functioning. The balance between two needs has led to the introduction of limits on access to justice without the presentation that judges are faced with a disproportionate number of cases that pose difficulties for the functionality of European justice.

Within this context the judges of the GC have already established (Dehousse, 2011; Alemanno, Pech, 2015;

59GC, T-288/97, Regione autonoma FriuliVenezia Giulia v. Commission of 4 April 2001, ECLI:EU:T:1999:125, II-01169, par. 49. Conclusions of the Generar Advocate Eleanor Sharpston in case: C-100/17 P, Gul Ahmed Textile Mills Ltd v. Council of 22 March 2018, published in the electronic Reports of the cases, ECLI:EU:C:2018:214, published in the electronic Reports of the cases, par. 31.

60See the conclusions of the Generar Advocate Henri Mayras in case C-43/72, Merkur-Außenhandels-GmbH v. Commission of 27 June 1973, ECLI:EU:C:1973:74, I-01055, par. 1077: “The application for annulment is of objective law and has the purpose of guaranteeing compliance with Community law, regardless of any claim for a subjective right (...)”.

Guinchard, Granger, 2016; Dehousse, 2016; Barnard, Peers, 2017; Sarmineto, 2017; Chalmers, Davies, Monti, 2019)[61] a new equilibrium that favors private claimants. A long list of declarations of admissibility of individuals' locus standi is one reason behind the need to reduce litigation pending before the Courts of the EU and the GC. A correlation between the constant increase in the number of cases brought before the GC sought to settle and declare inadmissible cases involving a condition of admissibility of a controversial nature to that of the absence of enforcement measures. The need to take the form of a backlog of work with an excessive duration of the proceedings is one of the reasons that form the basis of a restrictive interpretative attitude of the judges in relation to the enforcement measure, thus preventing an overload in justice and an unlikely imagining of the change of direction in the attitude of recent years. Perhaps we see a change that cannot be positive in the near future.

The latest revirement we have seen through the Montessori ruling relating to the admissibility of individual direct appeals according to the former Art. 230 TEU (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021) today was concentrated in the conditions provided for by Art. 263, letter. 4, TFEU (Schwarze, Becker,

61Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 341, 24.12.2015, p. 14-17.

Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Blanke, Mangiamelli, 2021). Overall, a certain specificity in the procedural sector as well as the absence of an appreciable number of subsequent pronouncements on the subject in line with consolidated orientation does not yet allow us to make a prognosis on the birth of a more appropriate and certain practice with this path of orientation, allowing us to assume an effective change of course even with delay which could ensure more effective jurisdictional protection of individuals.

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